Supreme Court, U.S.
FILED

No. 08- 081514 JUN 9 - 2009

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IN THE

Supreme Court of the United States

MARCUS W. STEPHENS,
Staff Sergeant, United States Air Force,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals
for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Dwight H. Sullivan
Counsel of Record
Tiffany M. Wagner
Captain, U.S. Air Force
Air Force Appellate
Defense Division
112 Luke Avenue
Suite 343
Bolling Air Force Base
Washington, D.C. 20032
(202)767-1562

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QUESTION PRESENTED

May a criminal defendant be sentenced more harshly due to the emotional stress that his accuser experienced as a result of the defendant exercising his constitutional rights to plead not guilty and to confront his accuser?

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PETITION FOR A WRIT OF CERTIORARI

Staff Sergeant Marcus W. Stephens, United States Air Force, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-11a) is reported at 67 M.J. 233. The opinion of the United States Air Force Court of Criminal Appeals (App., *infra*, 14a-35a) is reported at 66 M.J. 520.

JURISDICTION

The Court of Appeals for the Armed Forces (CAAF) granted Appellant's petition for review on October 29, 2008. (App., *infra*, 12a-13a.) The CAAF's judgment was entered on March 12, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT

This case concerns the permissibility of a criminal defendant's exercise of constitutionally guaranteed procedural rights being considered to the defendant's detriment at trial. The opinion below created a split among the United States courts of appeals and between a federal court of appeals and state supreme courts on this issue.

1. Petitioner, a staff sergeant in the United States Air Force, was tried and convicted by a general court-martial. He was arraigned on one count of committing carnal knowledge with a girl between the ages of 12 and 16, one count of sodomy, and two counts of committing indecent acts upon a girl between the ages of 12 and 16 in violation of 10 U.S.C. 920, 925, and 934. He pleaded not guilty to all of the charges. The court-martial, which consisted of a panel of six military officers, found him guilty of attempted carnal knowledge with a girl between the ages of 12 and 16, attempted sodomy with a girl between the ages of 12 and 16, and one count of committing indecent acts upon a girl between the ages of 12 and 16. The court-martial's panel members sentenced Petitioner to be confined for three years, to forfeit all of his pay and allowances, to be reduced to the lowest enlisted rank, and to be dishonorably discharged from the Air Force. The commander of the Eighth Air Force approved the sentence as adjudged.

2. All of the charges against Petitioner alleged that he engaged in sexual misconduct with his cousin by marriage, Miss BU. When the case was tried, Miss BU was 14 years old. The prosecution called Miss BU as its first witness. She testified from 8:30 in the morning of Thursday, October 27,

2005, until 1:50 that afternoon, including more than an hour of cross-examination by Petitioner's defense counsel. Tr. at 483-706. Following redirect and questioning by the panel members, she was also subjected to recross-examination. Tr. at 702-04. During both the cross- and redirect-examinations of Miss BU, references were made to her cross-examination by Petitioner's counsel during a pretrial proceeding called an Article 32 investigation. Tr. at 636, 693.

Miss BU's testimony accounted for almost 75% of the time devoted to the prosecution's entire guilt-phase case.

On the morning of Saturday, October 29, 2005, the panel members found Petitioner guilty of some, but not all, of the charges against him.

In the military justice system, when the defendant elects to try guilt or innocence before a panel of members, those same members also sentence the defendant if the case results in a conviction. The sentencing hearing is an adversary proceeding during which each of the parties is entitled to present evidence and confront the opposing party's evidence.

The prosecution did not call Miss BU as a sentencing witness. The only time she testified during the trial was as a prosecution guilt-phase witness.

The prosecution began its sentencing case at 1:11 on the afternoon of Saturday, October 29, 2005—almost 48 hours after Miss BU stepped down from the stand. The prosecution's first sentencing witness was Miss BU's father, Mr. Billy Jack Upchurch.

The prosecutor asked Mr. Upchurch to "tell us" how "the crimes here have affected" his daughter. Tr. at 1074. Mr. Upchurch answered by explaining

his daughter's diminished interest in sports and outdoor activities. Tr. at 1074-75.

The prosecutor then asked, "How about the effect of this process, the investigation and her testifying and what not, how has that impacted her and how has it impacted you?" Tr. at 1075. Petitioner's defense counsel objected on relevance grounds. *Id.* As is common in military practice, the objection was made and ruled upon in open court in front of the panel members rather than in a sidebar conference. The trial judge responded to the objection by ruling, "I'll allow it, it goes to victim impact. I'll allow it, go ahead." *Id.* Petitioner's defense counsel then renewed his objection, arguing, "They are asking to penalize the Defendant for invoking his right to have a trial and the process involved with that." *Id.* The trial judge responded, apparently speaking to the prosecutor, "Well, I think you need to focus a little bit, but the process is okay, what she has had to go through. That is fine, go ahead, focus it a little more." *Id.* Petitioner's defense counsel then sought to clarify, "[I]s that overruled?" *Id.* The trial judge replied, "Yes, in one sense. He can go through what the effect of it since this has come about until now and she has had to testify, the impact and the effect on her and that means as she has gone through the process, just the impact, emotionally on her." *Id.* Mr. Upchurch then testified:

> It has been totally devastating, what she has had to go through, what she has had to put up with; the constant retelling to different people, to different systems of the court system. I mean, to keep bringing it slamming it in her face, I mean, y'all just don't have a clue what this has done to my daughter.

> She is nowhere near the same daughter that she was before. It has just totally changed her one hundred percent.

Tr. at 1076.

During his sentencing argument, the prosecutor referred to the testimony "today of the victim's mother and her father" and reminded the panel members, "You heard from both [of BU's] parents today." Tr. at 1173, 1178. The trial judge then instructed the panel members that "[i]n selecting a sentence, you should consider all matters in extenuation and mitigation, as well as those in aggravation whether introduced before or after your findings." Tr. at 1193.

One of the six panel members who convicted and sentenced Petitioner was Lieutenant Colonel (Lt Col) Susan Basset. During voir dire, Lt Col Basset indicated that she had been a witness in two trials, the first when "I think I was fourteen years old," when she testified as a witness to an airplane crash. Tr. at 410. She characterized the experience of testifying as "a bit overwhelming." *Id.* Later in her life, she testified at a court-martial. R. at 410-11. She indicated that testifying "was much less terrifying as an adult than it was as a teenager." R. at 411.

The panel members sentenced Petitioner to three years of confinement, forfeiture of all of his pay and allowances, reduction to the lowest enlisted rank, and a dishonorable discharge. Tr. at 1204.

3. Both the Air Force Court of Criminal Appeals and the CAAF affirmed Petitioner's conviction and sentence. App., *infra*, 13a-35a, 1a-11a.

a. Petitioner appealed both his conviction and sentence on multiple grounds, including the trial judge's ruling on the defense counsel's objection to

Mr. Upchurch's testimony. The Air Force Court of Criminal Appeals—one of the military justice system's intermediate appellate courts—affirmed the convictions and sentence in a published opinion. App., *infra*, at 14a-35a.

b. The CAAF exercised its discretionary jurisdiction to decide "whether the military judge erred by allowing the father of the alleged victim to testify as evidence in aggravation, over defense objection, as to the impact on the alleged victim of the investigation and court-martial." App., *infra*, at 12a-13a. A three-judge majority of the CAAF held that the evidence's admission was legally correct. App., *infra*, at 1a-7a. The majority distinguished the United States Court of Appeals for the Eighth Circuit's opinion in *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001), as well as a previous military appellate opinion,* on the ground that "[h]ere, there was no explicit comment by the [prosecutor] or the father concerning Appellant's invocation of his rights but rather, a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim." App., *infra*, at 6a. The CAAF held, "Considering the facts of this case, we do not find the cited cases persuasive and find no constitutional violation." *Id.* The majority then held that Mr. Upchurch's testimony was permissible under Military Rule of Evidence 403, which is virtually identical to Federal Rule of Evidence 403. App., *infra*, at 6a-7a.

c. Judge Baker, joined by Chief Judge Effron, concurred in the result. App., *infra*, at 8a-11a. He observed that "the questions asked of the victim's father . . . implicated Appellant's constitutional right

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* *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987).

to trial." App., *infra*, at 8a. "Significantly," he added, the "defense counsel objected on that specific ground." *Id.* He ultimately concluded that Mr. Upchurch's testimony about the effect of the proceedings on his daughter violated Military Rule of Evidence 403. App., *infra*, at 10a. Judge Baker concluded, however, that the error was harmless under either a constitutional or nonconstitutional standard because the "emotional impact on the victim was dramatic, self-evident during the victim's testimony, and substantiated through expert testimony." App., *infra*, at 11a.

REASONS FOR GRANTING THE PETITION

The CAAF's decision below conflicts with decisions of other federal courts of appeals and state supreme courts precluding criminal defendants from being penalized for exercising constitutionally protected procedural rights. The United States Courts of Appeals for the Seventh and Eighth Circuits have concluded that it is improper in a criminal case to cast the defendant's exercise of such rights in a negative light. The Seventh Circuit reached this conclusion without regard to whether the prosecutor expressly mentioned that the right exercised—in that case, the right to counsel—was guaranteed by the Constitution. The Nevada and Wisconsin Supreme Courts have similarly concluded that a criminal defendant may not be sentenced more harshly due to his exercise of constitutionally guaranteed procedural rights.

Contrary to that case law, the CAAF allowed the prosecution to present aggravating sentencing evidence based on the adverse effects the accuser suffered from Petitioner's exercise of his right to

plead not guilty and to cross-examine his accuser, at least as long as the sentencing authority is not informed that those rights are constitutionally based. The CAAF's approach is inconsistent not merely with that of other federal courts of appeals and state supreme courts, but also with this Court's precedent.

A. Certiorari is appropriate to resolve a split among the federal courts of appeals and between a federal court of appeals and state supreme courts over whether a criminal defendant's exercise of constitutionally guaranteed procedural rights may be considered to the defendant's detriment at trial.

1. On the very day that the CAAF announced its opinion below, the United States Court of Appeals for the Seventh Circuit emphasized the impropriety of a prosecutor's summation "cast[ing] the defendant's exercise of his constitutional right to counsel in a negative light." *United States v. Farinella*, 558 F.3d 695, 700 (7th Cir. 2009) (quoting United States' brief). *Farinella* is consistent with a 49-year-old Seventh Circuit decision rejecting "the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful." *United States v. Wiley*, 278 F.2d 500, 504 (7th Cir. 1960). The United States Court of Appeals for the Eighth Circuit has taken a similar approach. In *Burns v. Gammon*, a habeas case arising from a Missouri state prosecution, the trial defense counsel failed to object to a prosecutor's argument in both

the guilt and sentencing phases that "by exercising his constitutional rights to a jury trial and to confront witnesses," the defendant had "forced the victim to attend trial, take the stand and relive the attack." 260 F.3d at 896. The Eighth Circuit held that the trial defense counsel's failure to object constituted ineffective assistance of counsel, reasoning that "[t]he prosecution cannot use the defendant's exercise of specific fundamental constitutional guarantees against him at trial." *Id.*

At least two state supreme courts have reached similar conclusions. In a case where the judge stated on the record that he sentenced a defendant more harshly because he maintained his innocence after being found guilty, the Nevada Supreme Court held that "[i]mposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion" that requires the sentence's reversal. *Bushnell v. State*, 637 P.2d 529, 531 (Nev. 1981) (per curiam). And in a case dealing with a trial judge's authority to sentence a criminal defendant more leniently because he remained silent during the guilt phase rather than falsely denying guilt, the Wisconsin Supreme Court observed that "[w]hile the waiver of a constitutional right may be taken into account in mitigation, its invocation may not be used in aggravation of the sentence." *Cresci v. State*, 278 N.W.2d 850, 854 (Wis. 1979).

2. Those courts' approach is consistent with this Court's case law. In a case dealing with a statute that allowed a death sentence to be imposed based on a jury verdict but did not authorize a death sentence where the trial was before a federal district judge or where the defendant pleaded guilty, this Court held, "Congress cannot impose [the death] penalty in a manner that needlessly penalizes the

assertion of a constitutional right." *United States v. Jackson*, 390 U.S. 570, 583 (1968). In contrast, the CAAF's decision below allows criminal defendants to be penalized needlessly due to the exercise of their constitutional rights to plead not guilty and to confront their accusers.

B. Petitioner was prejudiced by the trial judge's ruling, which allowed Petitioner to be sentenced more harshly because he exercised his constitutionally protected rights to plead not guilty and cross-examine his accuser.

1. Doctrinally, this Court's case law appears to treat the prosecution's adverse use of a criminal defendant's exercise of a constitutional right as a violation of the constitutional provision guaranteeing that particular right. So, for example, in *Griffin v. California*, even though the defendant was not actually compelled to testify, this Court treated the prosecutor's comment on the defendant's refusal to testify as a violation of the Self-Incrimination Clause. *See* 380 U.S. 609, 613-14 (1965).

A criminal defendant enjoys a "Fifth Amendment right not to plead guilty." *Jackson*, 390 U.S. at 581. And a criminal defendant enjoys a Sixth Amendment right to confront his accusers. U.S. Const. amend. VI. Military case law holds that each of those constitutional protections applies to courts-martial. *United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975); *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960). Accordingly, the presentation of sentencing evidence concerning the emotional toll on Miss BU resulting from testifying at Petitioner's

trial and the trial judge's indication to the panel members that they may properly consider that emotional toll in determining a sentence violated Petitioner's Fifth Amendment right to plead not guilty and Sixth Amendment right to confront his accuser.

2. The CAAF majority sought to distinguish the Eighth Circuit's *Burns* opinion, as well as military appellate precedent, on the ground that in this case neither the prosecutor nor Mr. Upchurch expressly referred to Petitioner's exercise of his constitutional rights. App., *infra*, at 6a. But a prosecutor must not be permitted to do with a wink and a nod what he or she may not do directly. As the Court below has previously recognized, "It is black letter law that a [prosecutor] may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990); *accord United States v. Taylor*, 54 F.3d 967, 978 (1st Cir. 1995) ("Even an indirect or inferential comment on a defendant's silence can transgress the Fifth Amendment."). Just as a prosecutor may not comment indirectly on the defendant's exercise of his Fifth Amendment right not to "be compelled in a criminal case to be a witness against himself," a prosecutor should not be allowed to comment on a defendant's invocation of his Sixth Amendment right "to be confronted with the witnesses against him" even if the prosecutor is sufficiently artful to do so without mentioning that the right is guaranteed by the Constitution.

Surely the panel members understood that the prosecutor was seeking a harsher sentence due to Petitioner pleading not guilty and subjecting his accuser to cross-examination. The panel members saw Petitioner's defense counsel object that "[t]hey

are asking to penalize the Defendant for invoking his right to have a trial and the process involved with that." Tr. at 1075. And the panel members saw the military judge overrule that objection, *id.*, which indicated to the panel members that they could use the evidence for precisely that purpose. The panel members no doubt understood Mr. Upchurch's testimony that followed as an assessment of the emotional toll on his daughter resulting from her hours on the stand, including more than an hour of cross-examination, in addition to her cross-examination during the Article 32 investigation, which was mentioned twice. That emotional toll was a direct result of Petitioner's exercise of his constitutional rights to plead not guilty and to confront his accuser.

The CAAF's express comment prerequisite for finding a constitutional violation conflicts not only with *Griffin v. California* and case law applying it, but also with the Seventh Circuit's approach in *Farinella*. Judge Posner's opinion for the court agreed with the United States' concession that the prosecutor's summation included remarks that were "improper" because "they cast the defendant's exercise of his constitutional right to counsel in a negative light." *Farinella*, 558 U.S. at 700. The first such statement was, "Ladies and gentlemen, don't let the defendant and his high-paid lawyer buy his way out of this." *Id.* The second was, "Black and white in our system of justice, ladies and gentlemen. You have to earn justice. You can't buy it." *Id.* Neither statement mentioned the Constitution, the Bill of Rights, or the Sixth Amendment. Yet the Seventh Circuit considered both as improperly commenting on the defendant's exercise of a constitutional right. Had the CAAF taken a similar

approach, it would have concluded that when the prosecutor elicited Mr. Upchurch's testimony about the emotional harm his daughter suffered from testifying, he was attempting to obtain a harsher sentence through improper means.

3. The concurrence below concluded that while the trial judge erred by permitting Mr. Upchurch's testimony, the testimony was harmless because the "emotional impact on the victim was dramatic, self-evident during the victim's testimony, and substantiated through expert testimony." App., *infra*, at 9a. But that overlooks the principal cause of prejudice: the trial judge's ruling that the panel members could properly use that "dramatic" emotional impact to enhance Petitioner's sentence. Had the trial judge sustained the defense's objection rather than denying it, the defense could have obtained an instruction that the panel members must not sentence Petitioner more harshly because his not guilty plea resulted in Miss BU testifying or because his defense counsel cross-examined her. Such an instruction would have been significant because court-martial panel "members are presumed to follow the military judge's instructions." *United States v. Holt*, 33 M.J. 400 (C.M.A. 1991). Instead, the trial judge instructed the panel members that in selecting a sentence, they should consider all matters in aggravation—matters which included Mr. Upchurch's testimony based on Petitioner's exercise of his constitutionally guaranteed procedural rights.

Allowing the panel members to consider this evidence was particularly prejudicial in this case. By striking coincidence, one of the panel members—Lt Col Basset—had testified as a witness when she was about 14-years-old and had found the experience terrifying. The trial judge's ruling on the defense

objection to Mr. Upchurch's testimony told all of the panel members, including Lt Col Basset, that they could sentence Petitioner more harshly due to the emotional harm that Miss BU suffered from testifying. It also freed Lt Col Basset to share her experience with the other panel members and freed them to consider Lt Col Basset's experience in exercising their broad discretion to choose an appropriate sentence. Had the trial judge properly ruled on the defense objection, on the other hand, the six military officers on the panel no doubt would have endeavored to follow any resulting cautionary instruction and not consider that emotional harm in choosing a sentence. Thus, the very "dramatic" emotional impact upon which the concurrence relied exacerbated the harm of the trial judge's erroneous ruling rather than mitigating it.

Mr. Upchurch's testimony was also prejudicial for another reason. The members saw Miss BU testify on Thursday, October 25. But her father did not testify about how appearing at the trial affected Miss BU until Saturday, October 27. Thus, Mr. Upchurch provided the panel members with information beyond what they saw for themselves during Miss BU's testimony; he informed them about Miss BU's reaction to testifying during the 48 hours since they had seen her.

Accordingly, had the CAAF not departed from the other federal courts of appeals' and state supreme courts' approach, it should have found that the trial judge's erroneous ruling prejudiced Petitioner and remanded his case for resentencing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dwight H. Sullivan
Counsel of Record
Tiffany M. Wagner
Captain, U.S. Air Force
Air Force Appellate
Defense Division
112 Luke Avenue
Suite 343
Bolling Air Force Base
Washington, D.C. 20032
(202)767-1562

APPENDIX A

UNITED STATES, Appellee
v.

Marcus W. STEPHENS, Staff Sergeant
U.S. Air Force, Appellant
No. 08-0589
Crim. App. No. 36682

United States Court of Appeals for the Armed Forces

67 M.J. 233

Argued January 12, 2009
Decided March 12, 2009

STUCKY, J., delivered the opinion of the Court, in which ERDMANN and RYAN, JJ., joined. BAKER, J., filed a separate opinion concurring in the result, in which EFFRON, C.J., joined.

Counsel

For Appellant: Dwight H. Sullivan, Esq. (argued); Major Shannon A. Bennett, Captain Anthony D. Ortiz, and Captain Tiffany M. Wagner (on brief).

For Appellee: Captain Coretta Gray (argued); Colonel Gerald R. Bruce and Major Jeremy S. Weber (on brief); Major Matthew S. Ward and Captain John M. Simms.

Military Judge: Mary M. Boone

Judge STUCKY delivered the opinion of the Court.

We granted review to determine whether the military judge erred by allowing the father of the victim to testify in sentencing about the effect the investigation and court-martial had on the victim. We hold that there was no error and affirm.

I. Background

Appellant, a twenty-one-year-old staff sergeant (E-5) was charged with inappropriately touching his thirteen-year-old cousin by marriage on two occasions at family parties, once in December 2003 and the other in August 2004. Appellant pled not guilty to carnal knowledge, sodomy, and indecent acts. Articles 120, 125, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 925, 934 (2000). A general court-martial with members convicted him of attempted carnal knowledge, attempted sodomy, and indecent acts, all in August 2004. Article 80, UCMJ, 10 U.S.C. §§ 880 (2000); Article 134, UCMJ. He was acquitted of the sole specification (indecent acts) that was alleged to have occurred in December 2003. The victim, BU, testified at length via closed-circuit television in the findings phase of the trial. She did not testify on sentencing. During the Government's sentencing case, the trial counsel called the victim's father to testify about the effect the crimes had on her. He testified concerning her emotional state and the fact that she no longer appeared to enjoy sports or other activities. The trial counsel then asked him the following question: "How about the effect of this process, the investigation and her testifying and what not, how

has that impacted her and how has it impacted you?" The following exchange then took place:

> CDC2: Your honor, we would object to the relevance of this testimony.
>
> MJ: I'll allow it, it goes to victim impact. I'll allow it, go ahead.
>
> CDC2: Your honor, we object. They are asking to penalize the Defendant for invoking his right to have a trial and the process involved with that.
>
> MJ: Well, I think you need to focus a little bit, but the process is okay, what she has had to go through. That is fine, go ahead, focus it a little more.
>
> CDC2: Your honor, is that overruled?
>
> MJ: Yes, in one sense. He can go through what the effect of it since this has come about until now and she has had to testify, the impact and the effect on her and that means as she has gone through the process, just the impact, emotionally on her.
>
> CDC2: Very [w]ell, your honor.
>
> MJ: You can talk about that.
>
> TC: Thank you.

> WIT: It has been totally devastating, what she has had to go through, what she has had to put up with; the constant retelling to different people, to different systems of the court system. I mean, to keep bringing it slamming it in her face, I mean, ya'll just don't have a clue what this has done to my daughter. She is nowhere near the same daughter that she was before. It has just totally changed her one hundred percent.

The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The United States Air Force Court of Criminal Appeals affirmed. *United States v. Stephens*, 66 M.J. 520, 529 (A.F. Ct. Crim. App. 2008).

II. Analysis

We test a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Rule for Courts-Martial (R.C.M.) 1001(b)(4) provides as follows:

> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and

> medical impact on or cost to any person . . . who was the victim of an offense committed by the accused . . . .

Testimony as to the effect of the process, including the trial, on the victim, as was admitted here, certainly comes within the rather broad ambit of this rule. Of course, a rule or other provision of the *Manual for Courts-Martial* cannot sanction a violation of Appellant's constitutional rights. *See United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) (noting that the military justice system has hierarchical sources of rights beginning with the Constitution and that "[n]ormal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual"). Furthermore, sentencing evidence is subject to the requirements of Military Rule of Evidence (M.R.E.) 403. *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)). When the military judge conducts a proper balancing test under M.R.E. 403 on the record, her ruling will not be overturned absent a clear abuse of discretion; the ruling of a military judge who fails to do so will receive correspondingly less deference. *Id.*; *Manns*, 54 M.J. at 166. Here, while the military judge limited the ambit of the father's testimony, she did not perform the balancing test on the record.

Appellant, citing *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990), *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987), and *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001), argues that the father's

testimony was an impermissible comment on Appellant's right to plead not guilty, confront the witnesses against him, and put the Government to its proof, and hence constitutional error.

This case is not analogous to the cases cited. In *Mobley*, the trial counsel called attention to the accused's failure to testify by apostrophizing at length, asking rhetorical questions of the mute accused and providing his own answers.[1] Both *Carr* and *Burns* were cases in which the government, at trial, explicitly commented on the fact that the appellant's invocation of his constitutional right to a trial forced the victim to endure the rigors of cross-examination and relive the experience of being attacked. *Carr*, 25 M.J. at 638; *Burns*, 260 F.3d at 896. Here, there was no explicit comment by the trial counsel or the father concerning Appellant's invocation of his rights but rather, a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim. Considering the facts of this case, we do not find the cited cases persuasive and find no constitutional violation.

This does not end the inquiry, however, as relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. M.R.E. 403. When, as here, a military judge fails to conduct the M.R.E. 403

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[1] 31 M.J. at 278-79. We did not hold this to be error, but vacated and remanded. *Id.* at 280. On remand, the Air Force Court of Military Review found error but held it to be constitutionally harmless. *United States v. Mobley*, 34 M.J. 527, 529, 531-32 (A.F.C.M.R. 1991). We summarily affirmed. *United States v. Mobley*, 36 M.J. 34 (C.M.A. 1992).

balancing test on the record, we will examine the record ourselves. *Manns*, 54 M.J. at 166.

The overriding concern of M.R.E. 403 "is that evidence will be used in a way that distorts rather than aids accurate fact finding." 1 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 403.02[4], at 4-27 (6th ed. 2006). Doing so, we find that the father's testimony was probative because it showed specific psychological harm BU suffered as a result of Appellant's offense; she was no longer able to enjoy sports and other activities and had changed significantly. *See* R.C.M. 1001(b)(4) (stating that aggravation evidence includes evidence of psychological impact on the victim). The concern for unfair prejudice arises from the possibility that the court members might misuse this testimony as a comment on Appellant's right to confront and cross-examine the witness. Under the circumstances of this case, we find that possibility remote. The admission of this evidence did not distort accurate fact finding. Limited as the father's testimony was by the military judge, its probative value in establishing specific harm to the victim was not substantially outweighed by any danger of unfair prejudice to Appellant. The military judge did not abuse her discretion. The evidence was relevant victim impact evidence and properly admitted under R.C.M. 1001(b)(4).

We caution trial counsel introducing aggravation evidence under R.C.M. 1001(b)(4) to use care in eliciting testimony that may cross the line into impermissible comment on an accused's invocation of his constitutional rights. While we find no abuse of

discretion here, it is not difficult, particularly in cases involving sexual abuse, to envision such a case.

III. Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

BAKER, Judge, with whom EFFRON, Chief Judge, joins (concurring in the result):

Although I do not agree with the Court's conclusion that there was no error, I agree that Appellant was not prejudiced. For that reason, I concur in the result.

As the Court notes, this case is distinguished from *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987), and *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001), because the Government did not expressly comment on Appellant's constitutional right to trial or to remain silent. *United States v. Stephens*, 67 M.J. at 235-36 (C.A.A.F.2009). Rather, the father testified during a series of questions about the impact that the crime, the process, and testifying had on his daughter. But the questions asked of the victim's father, while more opaque than in *Carr* and *Burns*, nonetheless implicated Appellant's constitutional right to trial. Significantly, defense counsel objected on that specific ground. Moreover, the question to which counsel objected was clearly segregated from the previous question, which dealt with the emotional impact of the offense generally. The question objected to dealt with the impact of the trial itself.

> TC: How about the effect of this process, the investigation and her testifying and what not, how has that impacted her and how has it impacted you?
>
> . . . .
>
> WIT: It has been totally devastating, what she has had to go through, what she has had to put up with; the constant retelling to different people, to different systems of the court system. I mean, to keep bringing it slamming it in her face, I mean, ya'll just don't have a clue what this has done to my daughter. She is nowhere near the same daughter that she was before. It has just totally changed her one hundred percent.

Therefore, the issue was plainly before the military judge and this is not a case where the issue is only found with the clear vision of line-by-line appellate hindsight. Accordingly, the military judge was obliged to address whether the proffered testimony was directly related to the offense and legally relevant under Military Rule of Evidence (M.R.E.) 403. *See United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing two limitations on the admission of aggravation evidence, that such evidence is "'directly relating' to the offenses of which the accused has been found guilty" and passes the test of M.R.E. 403). Here, it is clear that, for the purpose of M.R.E. 401 and Rule for Courts-Martial 1001(b)(4), the testimony directly related to the

impact of the offense on the victim, including the testimony about the investigation and related proceedings. *See United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) ("The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.' Evidence is admissible on sentence which shows 'the specific harm caused by the defendant.'") (citations omitted).

The problem is that the question and answer also referenced the victim's testimony at trial. As a result, on these facts the M.R.E. 403 balancing test should have broken in Appellant's favor. The probative value of the answer to this question was weak in light of the other extensive evidence of emotional impact. This evidence included the father's other testimony, the mother's testimony, and the expert opinion of the psychologist on sentencing; all of which discussed how the offense had affected the victim's emotional well-being and changed her as a person. Additionally, the victim testified for more than four hours during Appellant's court-martial, and the members could observe for themselves the emotional impact of the offense and subsequent process on her. On the other hand, the father's answer implicated Appellant's right to trial. In a court-martial before members, that raised the possibility that one or more members might sentence Appellant not only for his offense and its direct impact on the victim, but also for compelling the victim to endure the burden of testifying at trial, which is his constitutional right. That significant due process risk outweighed the probative value of the evidence.

However, in the final analysis, the error in M.R.E. 403 balancing was harmless for much the same reason that the evidence was not probative. The emotional impact on the victim was dramatic, self-evident during the victim's testimony, and substantiated through expert testimony. For this reason, any error was harmless using either a constitutional or nonconstitutional standard.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 08-0589/AF
Crim. App. No. 36682

United States, Appellee

v.

Marcus W. STEPHENS, Appellant

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 29th day of October, 2008,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE FATHER OF THE ALLEGED VICTIM TO

TESTIFY AS EVIDENCE IN AGGRAVATION, OVER DEFENSE OBJECTION, AS TO THE IMPACT ON THE ALLEGED VICTIM OF THE INVESTIGATION AND COURT-MARTIAL.

Briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES v. Staff Sergeant MARCUS W. STEPHENS, United States Air Force

ACM 36682

66 M.J. 520, 2008 CCA LEXIS 104

March 26, 2008, Decided

Sentence adjudged 29 October 2005 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Mary Boone. Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Terri R. Zimmermann (argued), Lieutenant Colonel Mark R. Strickland, Captain Christopher L. Ferretti, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Major Brendon K. Tukey (argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Captain Daniel J. Breen, and Captain Jefferson E. McBride.

Before
FRANCIS, SOYBEL, and BRAND
Appellate Military Judges.

OPINION OF THE COURT

SOYBEL, Judge:

Contrary to his pleas, the appellant was found guilty of one specification of attempted carnal knowledge, one specification of attempted sodomy of a child, and one specification of committing an indecent act upon a female under the age of 16 years, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934.

The appellant was charged with committing several sexual offenses against his young cousin-by-marriage, BU. The acts allegedly occurred on two separate occasions, in December 2003 and August 2004. He was acquitted of the charged acts relating to the earlier date but convicted of acts which occurred in August 2004. At that time, BU was 13 years old.

In August 2004, the appellant attended a get-together at his grandparent's farm in Gilmer, Texas. According to BU, the appellant invited her to accompany him on a walk to shoot his gun and walk to a creek located approximately a quarter of a mile from the house. BU testified the appellant stopped and initiated sexual contact with her several times during their walk. The sexual contact increased at each stop and culminated behind a barn near the house, where she stated the appellant pulled down her pants and underwear and performed various sexual acts upon her. According to BU, she started to cry and told the appellant she was scared. He told her he would not do anything more and would wait

until a later time before going any further. The appellant did not testify at trial.

The appellant raises a total of seven issues. One issue, containing three sub-issues, involves the Article 32, UCMJ, 10 U.C.S. § 832 investigation. Two issues allege erroneous evidentiary rulings by the military judge involving hearsay, which the appellant contends prevented him from presenting a defense. Two issues relate to rulings by the military judge purportedly allowing statements made by the appellant to investigators and his wife to be used on cross-examination in the event the appellant testified in his own defense. One issue asserts certain testimony by BU's father, made during the sentencing phase of the trial, was improper. Finally, the appellant challenges the legal and factual sufficiency of the evidence. For the reasons set out below we find no error.

The Article 32, UCMJ, Investigation

The appellant raises three specific issues related to the Article 32, UCMJ investigation on his case. He asserts the investigating officer (IO) considered inadmissible evidence when he read the Air Force Office of Special Investigations (OSI) report to prepare for the hearing; the IO abandoned his neutral and impartial role because he conducted almost all of the questioning of the witnesses himself; and lastly, the IO denied the appellant his right to confrontation by finalizing the witnesses' written statements after the hearing closed and outside of the presence of the appellant.

When reviewing allegations of error in an Article 32 investigation we will reverse only when there is a showing of prejudice to a substantial right of the accused. *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007); *see also United States v. Reynolds* 24 M.J. 261 (C.M.A. 1987); *United States v. Davis*, 20 M.J. 61 (C.M.A 1985). Notwithstanding this precedent, the appellant urges us to apply a presumption of prejudice as expressed in *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985). We decline to follow this standard of review and will follow the standard espoused in *Davis*, 64 M.J. 445. When reviewing the military judge's findings, we will accept her findings of fact unless they are clearly erroneous. *United States v. Tippit*, 65 M.J. 69, 79 (C.A.A.F. 2007); *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

In this case, the IO testified at trial. He stated he reviewed a copy of the OSI investigation report before he conducted the Article 32 investigation, but did so only to become familiar with the nature of the case and to focus his questioning. He clearly stated under oath that he did not consider the OSI report when making his recommendations to the convening authority. The military judge found the IO to be credible and found that he did not let the OSI report influence his recommendations to the convening authority.

As to the IO conducting most of the questioning of the witnesses, as opposed to the trial counsel, this procedure did not prejudice the appellant. He was present during the Article 32 investigation and had the opportunity to cross-examine the witnesses. Although the procedure deviates from usual Air

Force practice, we note Article 32, UCMJ, places the burden on the IO to thoroughly and impartially investigate charges. The burden is not on the government's counsel. In fact, appointment of government counsel is discretionary on the part of the commander who directed the investigation. It was not improper for the IO, acting under this mandate, to conduct the Article 32 investigation in the manner he did. The IO noted one of the government's counsel was due to leave for a new assignment the next day and the other counsel was an inexperienced judge advocate who had never participated in an Article 32 investigation. Further, because of his extensive experience as an administrative law judge,[1] he felt very comfortable questioning witnesses, especially the young victim in this case. We agree with the military judge that the IO was merely trying to gain a clear understanding of the events and facts pertaining to the charged offenses and was not taking on the role of government counsel or abandoning his impartial role.

Finally, we point out that the IO in the *Martel* case, cited above by the appellant, went even further than the IO in the case sub judice, in that he read police reports involving other crimes committed by the accused, went to the scene of the offense under investigation, and had an ex parte conversation with one of the witnesses. As in this case, the IO in *Martel* testified these events did not influence his decision about the charges he was investigating. Even applying the presumption of prejudice

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[1] The IO was a reserve judge advocate.

standard, the *Martel* court found the IO's testimony overcame the presumption.

The appellant's final assertion of error regarding the Article 32 investigation involved post-hearing conduct by the Investigating Officer. After taking testimony at the hearing, the IO summarized the witnesses' testimony, mailed each witness a copy of the summarization, then called each witness to have them confirm their respective summaries. The IO testified no substantial changes were made by the witnesses; only minor grammatical corrections. Further, the IO testified he would make adjustments only after he could personally verify the changes from his own recollection of the witness' live testimony. The appellant argues that the IO's action in this case denied him his right to confrontation, as was the case in *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985).

In the *Whitt* case, the IO conducted two ex parte sessions with three witnesses and received additional evidence outside the presence of the appellant and his counsel. The convening authority corrected this situation by ordering the IO to reopen the hearing and further ordered him not to consider the new evidence. Even applying a "presumption of prejudice" standard, the court found the convening authority's corrective actions resulted in preventing prejudice to the accused.

This case differs from *Whitt*. In the instant case, the IO did not elicit any new information from the witnesses. He merely had them confirm information already given when the appellant and his counsel were present and had the opportunity to challenge

the testimony and ask further questions. Indeed, other than objecting to the procedure utilized by the IO, the appellant can point out neither changes in testimony nor prejudice that resulted from the post-hearing summarization process.

Certainly, if changes in a witness' testimony emerged as a result of this practice, a military judge would be faced with the question of whether the accused received a fair hearing. We do not face that situation in this case. The military judge found the IO was only verifying information obtained during the hearing and did not collect any additional evidence. We see no reason to disturb this finding of fact. *See Tippit*, 65 M.J. at 79. Therefore, we hold that an investigating officer does not violate an accused's right to confront witnesses under Article 32, UCMJ, when he asks witnesses to review and confirm summarizations of their testimony, obtains no new evidence, and no factually relevant changes to the testimony result from the post-hearing contact. If that were to happen then the remedy, as used in *Whitt*, would be to reopen the hearing.

Evidentiary Rulings Impacting the Appellant's Ability to Present a Defense

The appellant argues the judge erred in several evidentiary rulings. He asserts these rulings prevented him from presenting a defense. At the outset, we should note the theories presented by the government and the appellant at trial. The offenses first came to light when BU's mother read about them in her daughter's personal diary. The government's general theory of the case was that the appellant wanted BU secluded from the others

attending the gathering so he could initiate sexual contact with her. In this vein, BU testified the appellant told her they would wait until everyone else had either left the party or went in to take a nap before they went to the creek. On the other hand, the appellant's theory was that BU was not credible and had fantasized about the incidents with the appellant when she wrote about them in her diary, as she had about other boys from her school.[2]

The first evidentiary issue contested by the appellant involves exclusion of testimony by the appellant's sister. She would have testified the appellant asked her if she wanted to walk to the creek with him and that when she declined the offer, BU volunteered to accompany the appellant on the walk. This evidence would have been offered to show BU was not credible and it was she who asked to go on the walk with the appellant. It would also be used to counter the government's theory of the case that the appellant used the walk to the creek as an excuse to be alone with BU. The judge ruled this testimony was hearsay and inadmissible.

The appellant asserts the military judge erred in her ruling. He cites *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007), to support his argument that he was thereby denied his constitutional right to present a defense. The government counters this argument with cases such as *United States v. Carruthers*, 64 M.J. 340 (C.A.A.F 2007) and *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007), to

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[2] BU admitted that she made up entries in her diary concerning boys she knew and these entries were fantasies.

assert that although he may have been somewhat limited in his effort, the appellant was not denied his ability to present a defense.

The distinction between these two lines of cases is important. If the appellant was denied the opportunity to present a defense, the error would be of constitutional magnitude. If so, we must determine whether the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967). On the other hand, if the defense was merely limited in its ability to present a defense, the error would be considered a nonconstitutional error, and the government need only show that the error did not have a substantial influence on the findings. *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323 (C.A.A.F. 2003)).

McAllister involved an Army specialist convicted of unpremeditated murder. He was denied the opportunity to present evidence that three unidentified people's DNA (in addition to his) was found under the victim's fingernails. That evidence, while not excluding the appellant as the possible assailant, would have shown he was not the "sole contributor as the government portrayed him to be." *McAllister*, 64 M.J. at 253. The fact that the appellant's DNA was found under the victim's fingernails was a key factor in his conviction. Our superior court set aside the finding of guilty and the sentence because McAllister was "precluded . . . from presenting an entire line of defense to the members." *Id.*

Carruthers was a case involving an Army staff sergeant who was convicted of a conspiracy to steal over a million dollars worth of government property. During his trial, one of his co-conspirators testified against Carruthers. Carruthers' trial defense counsel crossed-examined the co-conspirator regarding the pre-trial agreement (PTA) he had made with federal authorities. He brought out the fact that by being tried in federal court, the witness would not undergo a court-martial and risk a punitive discharge; that to date, no one had discussed or initiated administrative separation of the witness; that the witness believed what happened to him after the court-martial would depend on his testimony at the appellant's trial; that if he did a good job testifying, the government would "take care of him"; and that he was facing only one count of theft of public property over $1,000 even though he could be facing many more counts. *Carruthers*, 64 M.J. at 342.

The defense counsel was not allowed to inquire about the co-conspirator's understanding of the sentence he would receive under the plea agreement. The military judge also did not allow the defense to bring out any more information regarding the co-conspirator's PTA, explaining that the defense had already made their point concerning the witness' interest in testifying at the appellant's court-martial. The defense objected to the military judge's ruling, arguing the members should know about the details of the witness's PTA because of the possibility he would lie to in order to receive a reduced sentence. *Id.* at 343.

Our superior court found no error in that situation because the defense was not denied "the right to examine the possibility of bias", but rather was "simply limited [in] its ability to inquire about yet another aspect of the plea agreement, when the agreement's bearing on bias had already been thoroughly explored." *Id. at 344.* The Court went on to explain "once the defendant has been allowed to expose a witness's motivation in testifying, 'it is of peripheral concern to the *Sixth Amendment* how much opportunity defense counsel gets to hammer that point home to the jury.'" *Id.* (quoting *United States v. James*, 61 M.J. 132, 136 (C.A.A.F. 2005) (citations omitted)).

Clearly this case falls on the same side of the fence as *Carruthers.* Even assuming for the sake of argument that the statement at issue was not hearsay and could have been admitted into evidence, we find no prejudice. Although the military judge's ruling limited some of the evidence the appellant wished to present concerning BU's lack of credibility, he certainly was not denied the opportunity to present his defense that BU should not be believed.

The appellant was able to present evidence which allowed the defense to argue that BU created fantasy entries in her diary about boys she liked and even went so far as to fabricate notes to herself, as if written by boys in whom she had an interest. The defense also pointed out there were pages missing from the diary that were adjacent to the pages describing incidents that led to the charges being brought. They pointed out that the diary entry was not dated, that BU was not as innocent or naive as the government portrayed her, and that she made

entries in her diary that conflicted with her testimony at trial. There was even more evidence the defense used to convince the members BU was not credible. The trial defense counsel argued BU was untruthful when she testified she knew her mother would read her diary and discover what happened, that a home video had exposed significant inconsistencies between some of her allegations and what was preserved on the video, and that her timeline of the events was inaccurate. In addition, the defense was able to attack BU's description of the clothes appellant wore as well as her description of a certain truck relevant to one of the alleged incidents. Finally, they were able to argue that her story concerning how the incident physically occurred didn't make sense and that she was untruthful about the appellant touching her inappropriately in a store.

These were but a few of the examples of BU's unreliability put forth by the defense during the closing argument on findings. In all, his argument totaled over 25 pages of the transcript and BU's incredibility was essentially the entire focus. Whether the appellant asked his sister or mother to walk to the creek before he went there with BU is just one more example which may have marginally added to the appellant's defense, but the military judge's ruling certainly did not prevent him from presenting the defense that BU was not credible.

The second evidentiary ruling contested by the appellant is similar to the one discussed immediately above. BU testified that at some point during the August family get-together, the appellant, his sister and BU went to Wal-Mart to shop. BU testified that

while they were in the store the appellant held her hand, touched her buttocks, and told her he was going to marry her. During the direct examination of the appellant's sister, the defense counsel asked whether she ever heard any discussion about the appellant marrying BU. The military judge sustained the trial counsel's objection to this question on hearsay grounds. She also ruled that a rephrased version of this question was inadmissible as hearsay. The defense counsel stated he did not want to submit the evidence to prove the truth of the matter asserted (to show the appellant wanted to marry BU), but rather to have the appellant's sister testify that she did not hear the appellant make such a comment. Thus, the defense was only asking whether the words were spoken.

The appellant claims this evidence would have impeached BU. They emphasized that BU was the only witness against the appellant, thereby making the use of this impeachment evidence "crucial" to the defense. For the reasons stated above, even assuming, arguendo, that the military judge's ruling was in error, the appellant was only partially limited in presenting his defense that BU was not worthy of belief and the ruling did not prevent him from presenting that defense to the members. *Carruthers,* 64 M.J. at 344. Finally, although the appellant's sister was not allowed to testify about the statements allegedly made at Wal-Mart, the same evidence was admitted through the testimony of the appellant's wife when the trial counsel failed to object. Any error in not allowing a second witness testify to the same facts is harmless. Given the above, we are convinced that the appellant was merely limited in his ability to present a defense and

any error caused by the exclusion of the testimony at issue would be a nonconstitutional error. After reviewing all the evidence admitted at trial, we find any error, assuming, arguendo, there was one, did not have a substantial impact on the findings.

The Appellant's Decision Not to Testify

Among the evidence the defense sought to suppress was a statement in an email message from the Army Criminal Investigations Division (CID). The email concerned an interview the CID conducted with the appellant while he was deployed. It read, "[SSgt Stevens] was interviewed and asked for a lawyer - stated 'knew this was coming, surprised it took this long.'" Because no witnesses with knowledge about the circumstances under which this interview occurred were present in court, it was unknown when, in relation to the time the appellant was read his rights under Article 31, UCMJ, the statement was made. In fact, the only evidence that the statement may have been made was the email.

While the military judge granted the defense's motion to suppress the statement, she ruled it was an indication of a consciousness of guilt and could be used to cross-examine the appellant if he testified; even if his testimony consisted of a general denial of the accusations.

Another related evidentiary ruling involved statements made by the appellant to his wife in confidence. His wife later related these comments to law enforcement agents. The appellant indicated he planned on calling his wife to testify about her observations of the events on the day in question.

The appellant also filed a motion in limine seeking a ruling from the military judge that would prevent the trial counsel from asking the appellant's wife about those statements because they fell under the husband-wife privilege, Mil. R. Evid. 504. After the military judge granted the appellant's motion and the trial counsel said he would not be asking her about the confidential communications, the military judge stated:

> Okay, just one second. Well I am going to preclude you for now. Obviously if the accused gets on the witness stand and he said things to her, I think it is open, cause she has made those public. . . . I am just kind of warning you that these things hang out there now over your head - over his head. . . . Since she isn't testifying about communications . . . I won't allow the government to go into those; however, I am just saying that it is hanging out there if the accused takes the witness stand.

Based on the military judge's rulings that the appellant's statement to the CID and his confidential communications to his wife might be used to cross-examine him, the appellant elected not to testify at his trial.[3] He argues on appeal that the decisions by the military judge forced him into choosing between not testifying in his own defense or testifying and then suffering the prejudice of the judge's erroneous

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[3] The appellant submitted this information through affidavits to this Court.

rulings. Thus, he claims he was prevented from presenting a defense.

This claim is without merit for two reasons. First, regarding the ruling on the statements covered by spousal privilege, the military judge did not actually make a ruling. Second, the appellant never testified, which is a requirement under military law in order to preserve both issues. *See United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995).

Jones clearly states that the witness must actually testify to preserve the issue for appeal. *Id.* at 710. In *Jones*, it was the appellant's wife who the defense decided not to call as a witness because of the judge's indication she would deny their motion in limine and allow the wife to be cross-examined on certain matters despite her assertion of the spousal privilege. *Id.* at 709.

In *Luce v. United States*, 469 U.S. 38 (1984), the accused decided not to testify after the judge's ruling that allowed the use of a prior conviction for impeachment purposes. The Supreme Court stated that an appellate court would be forced to speculate on the harm caused if the accused never testified. *Id.* at 41. The Court also recognized that the judge may even change his ruling depending on the actual testimony elicited and noted the prosecutor might even decide not to use the evidence that was the subject of the motion in limine. *Id.* at 41-42. *Jones* makes *Luce* applicable to courts-martial. *Jones*, 43 M.J. at 711; *see also United States v. Sutton*, 31 M.J. 11, 18 (C.M.A. 1990), *United States v. Gee*, 39 M.J. 311, 312 (C.M.A. 1994). Through supplemental

citations, the appellant urges us to depart from the reasoning of *Luce*, and find the issues were preserved sufficiently for appellate review notwithstanding the witness' failure to testify when the record clearly indicates what the testimony would have been had they testified. We decline to take this route and will abide by stare decisis. Further, we disagree that we could determine what the testimony in this record would have been given the nature of the cross examination. Certainly, there might be good arguments that some of the evidence discussed in the issue above would be allowed for impeachment purposes if the appellant testified. *See United States v. Swift*, 53 M.J. 439 (C.A.A.F. 1999); *United States v. Sykes*, 38 M.J. 669 (A.C.M.R. 1993).

Victim Impact Evidence

Citing *United States v. Bellingham*, ACM 33674, 2001 CCA LEXIS 18 (A.F. Ct. Crim. App. 29 Jan 2001) (unpub. op.), the appellant asserts the military judge erred when she permitted BU's father to testify, during the pre-sentencing phase of the trial, concerning the impact that the pretrial and trial process (specifically testifying at the Article 32, UCMJ, investigation and at trial) had on his daughter. Her father told the members that the process of testifying multiple times and having to retell the story of her victimization "has been totally devastating" to BU and that "[s]he is nowhere near the same daughter that she was before."

The appellant averred, at trial, that this line of testimony essentially punished him for asserting his constitutional right to a jury trial, to cross-examine

the witnesses against him, and to have the government bear the burden of proving every element of the offenses with which he was charged.

Bellingham was a case where the victim of a credit card theft was allowed to testify about the time he spent investigating the charges, the impact that lost time had on his military training, the problems he had correcting his credit rating, and the problems he had making future purchases. This Court found no error with any of that testimony. However, we did find problematic the victim's testimony regarding the timing of the Article 32 investigation, which interfered with the victim's departure date, his graduation, and his ability to attend to his immediate family when some members of it were ill. *Bellingham*, 2001 CCA LEXIS 18, at *2-3.

We held the testimony was improper evidence in aggravation because the appellant had no control over the *timing* of the judicial process, and the timing did not result from the appellant's offense. 2001 CCA LEXIS 18, at *7. However, we did find that the victim's obligation to testify was the direct result of the appellant's crimes and was not necessarily improper as evidence in aggravation. In fact, in *Bellingham* we stated "[w]e do not hold that evidence of the adverse effect on a witness resulting from their obligation to testify at trial can never be admissible as aggravation evidence in sentencing." 2001 CCA LEXIS 18, at *7. Nonetheless, in dicta, we did question whether such evidence would survive a Mil. R. Evid. 403 balancing test when compared with the appellant's exercise of his constitutional trial rights. However, in that case no

objection to the evidence was made at trial and the military judge did not perform the Mil. R. Evid. 403 analysis.

Rule for Courts-Martial (R.C.M.) 1001(b)(4) provides for the general principles of permissible evidence of aggravation at sentencing:

> (4) Evidence in aggravation.
>
> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

R.C.M. 1001(b)(4). Recently, in *United States v. Hardison*, 64 M.J. 279 (C.A.A.F. 2007), our superior court discussed the limitations on the admissibility of evidence pursuant to R.C.M. 1001(b)(4):

> There are two primary limitations on the admission of aggravation evidence. First, such evidence must be "directly relating" to the offenses of which the accused has been found guilty. This

> rule does "'not authorize introduction in general of evidence of . . . uncharged misconduct,'" *and* is a "'higher standard" than "mere relevance.'" The second limitation is that any evidence that qualifies under R.C.M.1001(b)(4) must also pass the test of Military Rule of Evidence (M.R.E.) 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact.

Hardison, 64 M.J. at 281 (citations omitted).

Although the evidence regarding the judicial process' emotional impact on BU was not uncharged misconduct, the two limitations mentioned above are appropriate. We hold under the circumstances of this case, the military judge did not abuse her discretion by permitting BU's father to testify how the multiple occasions BU had to testify impacted his daughter emotionally. This case was unlike *Bellingham* in that it did not involve the timing of the hearings, something that the appellant could not foresee and over which he had no control. However, it would be unreasonable for someone who commits an offense of this type to argue it is unforeseeable that the victim of a sexual assault would be called testify at a trial. Further, it would be just as unreasonable to argue that one could not foresee that the act of testifying could be emotionally difficult for a 13-year-old girl.

The military judge did consider the appellant's objection based on the *Bellingham* rational of "punishing" the appellant for asserting his rights. In

response, the military judge limited the father's testimony to the emotional impact on BU of having to go through the judicial process. Thus, unlike the timing issue in *Bellingham,* the military judge limited the evidence to that which was "directly related" to the offense. Having to testify at trial, unlike the timing of the hearing itself, is directly related to, and results from, the commission of the offense.[4]

Furthermore, by limiting the testimony as she did, the military judge struck a reasonable balance between the appellant's right to a trial and the government's ability to present evidence in aggravation. She did not allow the father to testify about every possible negative effect the process had on BU. She specifically limited his testimony to the emotional impact on BU of going through the judicial process. We find that the probative value of this testimony outweighed any likely prejudicial impact.

The remaining assignment of error by the appellant and his counsel has been considered and determined to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c),

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[4] We also note that there was no differentiation made between the defense's questioning of BU as opposed to the government's. However, in this case, it is clear that the impact felt by BU was a result of the judicial process itself, and not focused on the appellant's assertion of his rights within that process.

UCMJ, *10 U.S.C. § 866(c); United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.